Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

SCOT SPENCER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

KEITH D. KRAKAUR
Counsel of Record
ANDREW J. McLAUGHLIN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
Attorneys for Petitioner
919 Third Avenue
New York, New York 10022
(212) 735-3000

144291

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

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QUESTIONS PRESENTED

1. Whether the violation of an informal, non-adversarial administrative directive constitutes a "violation of [a] judicial or administrative order, injunction, decree, or process" subject to the sentencing enhancement of United States Sentencing Guideline § 2F1.1(b)(3)(B).

2. Whether, during a bankruptcy proceeding, the failure of a non-party to disclose assets of the bankrupt estate in violation only of generally applicable bankruptcy rules is a "violation of [a] judicial or administrative order, injunction, decree, or process" subject to the sentencing enhancement of United States Sentencing Guideline § 2F1.1(b)(3)(B).

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Scot Spencer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit below was rendered on October 30, 1997, and is reported at 129 F.3d 246. Petitioner's timely filed Petition for Rehearing was denied by order dated January 28, 1998. Petitioner Spencer was sentenced by the United States District Court for the Eastern District of New York on May 23, 1996. These decisions are reproduced as Appendices A, B and C, respectively.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within ninety days of January 28, 1998, the date on which the Second Circuit denied petitioner's timely filed Petition for Rehearing.

STATUTE INVOLVED

United States Sentencing Guideline § 2F1.1, applicable to "Offenses Involving Fraud or Deceit," establishes a base offense level of six. Section 2F1.1(b)(3)(B) provides for the following enhancement:

> If the offense involved . . . violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels.

The full text of the guideline, together with the relevant Application Note and Background Comment, is reproduced as Appendix D.

STATEMENT OF THE CASE

This case arises out of petitioner's involvement in the management and operation of Braniff International Airlines, Inc. ("Braniff") during 1991 and 1992. As a condition of maintaining authorization to conduct regularly scheduled flight operations, Braniff reached an agreement with the staff of the Department of Transportation in May 1991 to exclude its then-president, petitioner Scot Spencer, from involvement in the operation and management of the airline. The Department of Transportation required petitioner Spencer to submit an affidavit attesting that he would not be involved with the airline. At no time did the Department initiate formal proceedings against Spencer, or against Braniff in connection with Spencer's involvement.

On July 19, 1994, a grand jury in the Eastern District of New York indicted petitioner Spencer on four counts relating to his involvement with Braniff. The indictment alleged that, despite the affidavit, Spencer effectively ran the airline; that Spencer received more than $350,000 belonging to Braniff through a scheme in which money was laundered from Braniff, through Braniff's advertising agency, to Spencer; that Spencer received those payments while the airline was operating under the protection of Chapter 11 of the U.S. Bankruptcy Code; and that the payments were fraudulently concealed from Braniff's creditors.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner Spencer was convicted of bankruptcy fraud, in violation of 18 U.S.C. §§ 152 and 2, and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. § 371. He was acquitted of two counts of conspiracy to defraud the Department of Transportation, in violation of 18 U.S.C. § 371, and obstruction of a pending proceeding before the Department, in violation of 18 U.S.C. § 1505.

The district court sentenced Spencer to fifty-one months' imprisonment, three years' supervised release, restitution in the amount of $115,000 and a $100 special assessment. In calculating petitioner's sentence, the District Court enhanced Spencer's sentence by two levels pursuant to U.S.S.G. § 2F1.1(b)(3)(B). The District Court relied on two independent grounds for invoking the enhancement: (1) that his bankruptcy fraud violated the administrative "process" of the Department of Transportation; and (2) that his concealment of assets from the bankruptcy court violated the bankruptcy court's orders and processes. (App. C at 25a-27a). In a decision dated October 30, 1997, the Second Circuit affirmed the sentencing enhancement on the first basis, but declined to address the "difficult issue of whether Spencer's violation of bankruptcy orders also suffice[d] to support an increase" under section (b)(3)(B). (App. A at 12a).

On December 12, 1997, Spencer filed a timely Petition for Rehearing with a Suggestion for Rehearing *In Banc*. By order dated January 28, 1998, the Second Circuit denied the petition. (App. B).

REASONS FOR GRANTING THE WRIT

This case reflects and exacerbates a clear division of authority among the federal courts of appeals concerning the application of the sentencing enhancement for "violation of [a] judicial or administrative order, injunction, decree, or process. . . ." U.S.S.G. § 2F1.1(b)(3)(B). Each basis for the enhancement — administrative and judicial — has generated conflicting interpretations of its intended scope. As to administrative process, the courts of appeals have reached differing conclusions as to whether violations of informal directives that are not the result of adversary process fall within the guideline's reach. As to judicial process, the courts of appeals have divided over the applicability of the enhancement to violations of general bankruptcy rules.

Because the District Court below relied on both administrative and judicial process violations to invoke the § 2F1.1(b)(3)(B) enhancement, this case presents the Court with a rare and timely opportunity to resolve the divisions among the courts of appeals on each of the two bases for the enhancement. Moreover, because petitioner was never the subject of an administrative or judicial order, injunction or decree, this case squarely presents the precise issue that has divided the courts of appeals: the meaning of the term "process." Absent resolution of such divisions of authority by this Court, the Sentencing Guidelines will continue to be interpreted and applied differently in different circuits, producing disparate sentences and thereby undermining the nationwide uniformity in sentencing that was Congress's express purpose for instituting the guideline-based sentencing regime.[1]

I.

THE SECOND CIRCUIT'S CONCLUSION THAT VIOLATIONS OF "INFORMAL ADMINISTRATIVE 'PROCESS' " WARRANT ENHANCEMENT UNDER U.S.S.G. § 2F1.1(b)(3)(B) CONFLICTS WITH THE DECISIONS OF THE NINTH CIRCUIT AND OF AN EARLIER PANEL OF THE SECOND CIRCUIT.

The Second Circuit below held that by continuing to perform services for Braniff despite his affidavit to the contrary, and by concealing his involvement from Braniff's bankruptcy estate, Spencer had violated an "informal administrative 'process' " sufficient to trigger the U.S.S.G. § 2F1.1(b)(3)(B) enhancement for a "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in

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1. *See* United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, Ch.1, Pt.A.3, intro. comment, at 2-4 (Nov. 1997).

the guidelines. . . ." (App. A at 11a). This conclusion stands squarely at odds with the Ninth Circuit's decision in *United States v. Linville*, 10 F.3d 630 (9th Cir. 1993). Moreover, the holding below directly conflicts with the Second Circuit's own prior opinion in *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997).

The conflict centers on the scope of the term "process." The Second Circuit below held that "informal" administrative process is encompassed by the enhancement. In direct contrast, the Ninth Circuit has held that "process must be construed to be a directive based upon the kind of formalities that undergird orders, injunctions and decrees." *Linville*, 10 F.3d at 633. Thus, the Ninth Circuit concluded that § 2F1.1(b)(3)(B) "was meant to apply where a defendant violated a previously-issued judicial or administrative order which resulted from a formal adversary proceeding. . . ." *Id.* at 632. In *Linville*, the court examined whether a defendant violated the administrative process of the U.S. Department of Agriculture by disregarding official notices directing her not to sell dogs and cats without a license. The *Linville* court reversed the district court for applying the enhancement to violations of an informal administrative process that "neither resulted from an adversary proceeding nor constituted formal orders." *Id.* The court reasoned that "there is a vast difference between ignoring prior decrees, orders and injunctions after being subjected to formal proceedings, and ignoring letters and the like, no matter how official they may look." *Id.*

The Second Circuit's prior decision in *Carrozzella*, not cited by the *Spencer* court in its discussion of this guideline, adopted a similarly limited and irreconcilable construction of the term "process." In *Carrozzella*, the court distinguished the guideline's use of the phrase "violation of any judicial process" from the term "abuse of process," noting that the former expression is

"considerably narrower" in scope. *Carrozzella*, 105 F.3d at 800. The court determined that "the term 'process' — the command or warning violated — is used, not in the sense of legal proceedings generally, but in the sense of a command or order issued to a specific party. . . ." *Id.*

Both *Linville* and *Carrozzella* rely on the Background commentary to § 2F1.1(b)(3)(b) as a source of support for their narrower reading of the term "process." The Background commentary states:

> A defendant who has been subject to civil or administrative proceedings or the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

U.S.S.G. § 2F1.1, comment. (backg'd.). As this comment suggests, "the enhancement in question applies to fraud defendants only when they commit their fraud in the face of some type of official warning or order directed specifically to them." *Carrozzella*, 105 F.3d at 800. Petitioner Spencer, by contrast, was never the recipient of any official order directed specifically to him, nor was he the subject of any formal proceeding by the Department of Transportation. In this case, Braniff was subject to a Department of Transportation condition not to continue to employ Spencer, and the Department never initiated formal proceedings against Braniff with respect to this condition.

The Second Circuit decision below attempts to distinguish *Linville* on its facts but succeeds only in confirming that its reasoning is irreconcilable with that of *Linville* and *Carrozzella*.

Brushing aside the language of the guideline itself, the court below transforms the enhancement from a penalty for specific conduct into a penalty for all evidence of aggravated criminal intent, regardless of whether a formal and specific administrative order or process has been violated. The court's novel and expansive construction relies on the "aggravated criminal intent" language in the Background note to U.S.S.G. § 2F1.1, quoted above. (App. D at 30a). By stretching the enhancement to fit petitioner Spencer solely on account of his perceived "aggravated criminal intent," rather than by finding (as it could not) a violation of a particular administrative order or process, the Second Circuit below seeks to obscure the straightforward conflict between its holding and the holdings of *Linville* and *Carrozzella*, which would permit the enhancement only where the defendant has violated formal orders issued specifically to the defendant following adversary proceedings.

Interestingly, the Second Circuit below held that the enhancement would apply to petitioner Spencer "whether Spencer chose to submit to and violate a formal DOT process, or whether he deliberately avoided such process by giving solemn promises to DOT which he later violated. . . ." (App. A at 12a). The theory that an individual can violate administrative process by "deliberately avoid[ing] such process" further demonstrates the misunderstanding of the court below as to the nature of the "process" contemplated by § 2F1.1(b)(3)(B). Where no process has been initiated against an individual, that individual cannot be held accountable for "avoiding" something which does not exist. In suggesting otherwise, the Second Circuit panel below demonstrates the need for Supreme Court review to correct this erroneous interpretation of the guideline, which conflicts with both with a decision in the Ninth Circuit and with a prior ruling by the Second Circuit itself.

II.

THE COURTS OF APPEALS ARE FIRMLY DIVIDED OVER WHETHER THE FAILURE OF A NON-PARTY TO DISCLOSE ASSETS OF A BANKRUPTCY ESTATE CONSTITUTES A VIOLATION OF A JUDICIAL ORDER OR PROCESS WITHIN THE MEANING OF U.S.S.G. § 2F1.1(b)(3)(B).

As an alternative basis for applying the § 2F1.1(b)(3)(B) enhancement to petitioner Spencer, the District Court below found that he had concealed assets from Braniff's creditors, thereby triggering the enhancement for violation of a judicial process. (App. D at 25a-27a). The Second Circuit, having affirmed the enhancement on the grounds attacked above, declined to address "the difficult issue of whether Spencer's violation of bankruptcy orders also suffices to support an increase under the same provision." (App. B at 12a). The District Court's reliance on this ground for the application of the enhancement provides this Court with a clean and timely opportunity to resolve what has become a widely-noted and intractable division of authority among the courts of appeals.

The division among the circuits on this question was recently noted and discussed by the Fifth Circuit in *United States v. Saacks*, 131 F.3d 540, 543-46 (5th Cir. 1997). As that court observed, a majority of the courts of appeals have taken the position that bankruptcy fraud of any kind "violates a judicial process, thereby justifying the two-level increase," *id.* at 545, regardless of the fact that the defendant did not violate any particular judicial order, injunction or decree. This conclusion, first announced by the Eighth Circuit in *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991), has since been adopted by the Seventh, Ninth, Tenth, and Eleventh Circuits, as well as by the Fifth Circuit in *Saacks*. *See United States v. Michalek*, 54 F.3d

325, 330-33 (7th Cir. 1995); *United States v. Welch*, 103 F.3d 906, 907-08 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Bellew*, 35 F.3d 518, 520-21 (11th Cir. 1994).

At the same time, as the *Saacks* court noted,

> a growing minority of the circuits — including the First Circuit and the Second Circuit – have retreated from the automatic enhancement and now take the position that, without more, § 2F1.1(b)(3)(B) does not automatically mandate a two-level increase in every bankruptcy fraud proceeding.

Saacks, 131 F.3d at 545 (citing *United States v. Shadduck*, 112 F.3d 523 (1st Cir. 1997) and *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997)). Indeed, the First Circuit in *Shadduck*, 112 F.3d at 529, carefully analyzed the language of and commentary to the enhancement, holding that "we are unable to agree that a bankruptcy rule or official form is a 'judicial order,' as the term is used in section 2F1.1(b)(3)(B)." The First Circuit explained that if general bankruptcy rules and forms were elevated to judicial "orders" for purposes of § 2F1.1(b)(3)(B), the enhancement

> would become applicable in all bankruptcy fraud cases, simply by virtue of the forum in which the false statements were made and without regard to the aggravated criminal intent it was designed to redress.

Id. at 530. Accordingly, the court announced the sensible rule that

> if the government cannot demonstrate that a prior order, decree or injunction prohibited the defendant

> (or an entity controlled by the debtor) from engaging in the type of fraudulent conduct which formed the basis for his conviction, there has been no showing that the defendant acted with the aggravated criminal intent envisioned by the Sentencing Commission in section 2F1.1(b)(3)(B). . . .

Id.

In *Carrozzella*, the Second Circuit reached a similar conclusion in the context of an abuse of probate court process. There, the court opined that violation of a general rule not to file false accounts with the probate court did not rise to the level of violating a judicial order or process for purposes of § 2F1.1(b)(3)(B) because the violated rule applied "to all trustees and not specifically [to defendant]." *Carrozzella*, 105 F.3d at 800. The *Carrozzella* court added that it was unlikely that "fraudulent filings in, or representations to, courts or agencies" constituted grounds for a section (b)(3)(B) enhancement. *Id.*

Further compounding the inter- and intra-circuit divisions on this question, the Ninth Circuit in *United States v. Scarano*, 975 F.2d 580 (9th Cir. 1992), held that the enhancement was not appropriate for a defendant who had committed fraud while under a bail order containing a general condition that he commit no crimes. The court held that a general bail order did not constitute a "judicial order" for section (b)(3)(B) purposes since "[n]o reason comes to mind why violation of a general bail condition should add offense levels for fraud but not for other crimes." *Id.* at 583. The reasoning in *Scarano* stands in stark contrast to the Ninth Circuit's later holding in *United States v. Welch*, 103 F.3d 906, 907-08 (9th Cir. 1996), that § 2F1.1(b)(3)(B) applies to violations of general bankruptcy court rules, even where the defendant has not violated a specific judicial order, injunction or decree.

The importance of this division of authority is well illustrated by the case of petitioner Spencer. Spencer was not himself a debtor seeking the protection of the bankruptcy court. The bankruptcy court never entered an "order, injunction [or] decree" directing petitioner to disclose the assets of the debtor. Nor did Spencer in any way subject himself to the judicial process of the bankruptcy court — indeed, Spencer was not a party to the bankruptcy proceeding. Yet the District Court below held that by concealing and conspiring to conceal Braniff's assets from its creditors, petitioner's conduct warrants an enhancement as a violation of the bankruptcy court's general rules and processes. Had petitioner Spencer by some fortuity been convicted in the First Circuit, no enhancement under § 2F1.1(b)(3)(B) would have been permitted. By upholding the District Court's sentence, the Second Circuit below exacerbates the existing intractable division among the circuits and within the Second Circuit itself.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH D. KRAKAUR
Counsel of Record
ANDREW J. McLAUGHLIN
SKADDEN, ARPS, SLATE, MEACHER
& FLOM, LLP
Attorneys for Petitioner
919 Third Avenue
New York, New York 10022
(212) 735-3000

APPENDIX

EDITOR'S NOTE

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 30, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1031—August Term 1996

(Argued March 5, 1997 Decided October 30, 1997)

Docket No. 96-1460

UNITED STATES OF AMERICA,

Appellee,

—v.—

SCOT SPENCER,

Defendant-Appellant.

Before:

WALKER, MCLAUGHLIN, and WOOD,*

Circuit Judges.

Defendant-appellant Scot Spencer appeals from a judgment of conviction following a jury trial in the United States District Court for the Eastern District of New York (Reena

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* The Honorable Harlington Wood, Jr. of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Raggi, *District Judge*). The jury found Spencer guilty of bankruptcy fraud in violation of 18 U.S.C. § 152 and conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371. On May 23, 1996, Spencer was sentenced in principal part to a term of fifty-one months of imprisonment and three years of supervised release.

Affirmed.

JUDD BURSTEIN, Burstein & Fass LLP, New York, New York, *for Defendant-Appellant*.

ERIC CORNGOLD, Assistant United States Attorney, Brooklyn, New York, (Emily Berger, Jason Brown, Assistant United States Attorneys, Zachary W. Carter, United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee*.

WALKER, *Circuit Judge*:

Defendant-appellant Scot Spencer appeals from a judgment of conviction following a jury trial in the United States District Court for the Eastern District of New York (Reena Raggi, *District Judge*). The jury found Spencer guilty of bankruptcy fraud in violation of 18 U.S.C. § 152 and conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371. On May 23, 1996, Spencer was sentenced in principal part to a term of fifty-one months of imprisonment and three years of supervised release.

Appendix A

On appeal, Spencer argues that his conviction for bankruptcy fraud was based on legally insufficient evidence; that his conviction for conspiracy to commit bankruptcy fraud cannot stand because the government failed to prove the existence of a coconspirator; and that in various respects his sentence violated the United States Sentencing Guidelines.

We affirm.

BACKGROUND

This case arises from Spencer's inability to disassociate himself from the most recent reincarnation of Braniff Airlines. The original Braniff Airlines ("Braniff I"), founded in the early days of commercial aviation, filed for bankruptcy in 1982. Subsequently, an investment group purchased Braniff's name and certain assets to form another airline, Braniff, Inc. ("Braniff II"). In 1988, a corporation controlled by Jeffrey Chodorow and Arthur Cohen purchased a controlling interest in Braniff II. In 1989, Braniff II ceased operations and filed for bankruptcy. In 1990, Chodorow and Cohen, seeking to restart Braniff Airlines, formed a holding company named BNAir, Inc. and purchased the Braniff name from the Braniff II bankruptcy estate. Spencer was named president of BNAir. However, BNAir could not offer commercial passenger service without obtaining a "certificate of public convenience and necessity" from the United States Department of Transportation ("DOT"). *See* 49 U.S.C. § 41102(a). The DOT requires that applicants for such a certificate pass a fitness test. *See* 49 U.S.C. § 41102(b)(1).

In a meeting between BNAir and DOT in January 1990, the DOT advised BNAir that it had significant objections to BNAir's proposed passenger service. In particular, DOT

expressed its concern about Spencer's role with the company, citing his lengthy criminal history and poor performance record with Braniff II.

Faced with this obstacle, BNAir decided to obtain the necessary certificate by a different route. In late 1990, BNAir entered into a purchase agreement with Emerald Air, Inc., an airline in bankruptcy that already possessed the necessary certificate. As a result of the purchase agreement, BNAir and Emerald merged and named the resulting entity Braniff International Airlines, Inc. ("Braniff"). The DOT continued to raise questions about, among other things, Spencer's involvement in the resulting airline and the agency commenced a review of Emerald's continued fitness to possess a certificate.

In May 1991, DOT informed Braniff that Chodorow, Cohen and Spencer must submit sworn affidavits to the DOT attesting that Spencer would hold no position and have no involvement in Braniff. The DOT stated that it would refuse to certify the airline in the absence of the affidavits. On May 31, 1991, the requested affidavits were submitted. In his affidavit, Spencer stated that he would not hold any position or have any direct or indirect involvement in Emerald or any successor carrier. He promised not to make decisions on behalf of the carrier, commit the carrier in any way, direct any of its employees, or provide it with any consulting or advisory services. The DOT reissued Emerald's certificate to Braniff and Braniff commenced passenger service in July 1991.

This latest Braniff fared no better than its predecessors and in August 1991 filed a Chapter 11 bankruptcy petition. In September 1991, Chodorow became Braniff's President and Chief Executive Officer.

Despite the representations in the affidavits submitted to the DOT, Spencer remained heavily involved in the opera-

tions of Braniff both before and after it filed under Chapter 11. Although it was a point of dispute at trial, Spencer now concedes that he "acted openly and flagrantly on behalf of Braniff." Appellant Spencer's Br. at 7.

It was Spencer's effort to receive compensation surreptitiously for his services to Braniff that led to his convictions for bankruptcy fraud and conspiracy. Spencer's scheme was to launder Braniff's payments to him and thereby conceal them from the bankruptcy court and Braniff's creditors through an advertising agency owned by one Stephen Pliss. In January 1992, Pliss met with Spencer and Spencer's father to discuss placing the airline's advertising in various newspapers. According to Pliss, the usual industry practice prior to 1980 was for advertising agencies to bill their clients for the full amount of an advertisement but receive a 15% discount from the newspaper which the agency would keep as a commission. After 1980, however, fewer clients permitted agencies to keep the full 15% as a commission and it was customary for advertisers to negotiate a lower rate with agencies. According to Pliss, when he negotiated with Spencer, he initially asked Spencer for a 7.5% commission, but ultimately accepted 4%.

After agreeing upon the 4% commission, Spencer asked Pliss, and Pliss agreed, not to return directly to Braniff the 11% balance of the 15% commission, but instead to disburse 10% to Spencer and 1% to Spencer's father. Spencer received payments from Pliss in this manner from January to April 1992. During this period, Spencer played a significant role in directing Braniff's advertising budget, other payments from Braniff to Pliss, and the overall operations of Braniff. As a company operating under the protection of Chapter 11, Braniff was required to submit reports accounting for its expenditures to the bankruptcy court and its creditors. None of these reports reflected the payments made to Spencer. Pliss

testified that he believed the payments to Spencer were in fact refunds to Braniff.

Evidence at trial demonstrated further that on several occasions Braniff paid Pliss more than the total cost of the advertising placed by Pliss. On one occasion Pliss was overpaid by $72,554. Pliss passed these overpayments along to Spencer pursuant to Spencer's instructions. Spencer received a total of $351,411 from Pliss, most of it from the advertising discounts but also $97,500 from the "overpayments."

In March 1992, the Federal Aviation Administration ("FAA") and the DOT told Braniff that they were informed that Spencer was acting in a management capacity at the airline and that the FAA was considering whether to suspend the airline's authority to operate. In meetings with the FAA and DOT, Chodorow denied that Spencer was involved in any capacity with Braniff and submitted another affidavit swearing that Spencer had not been involved with Braniff since July 1, 1991. Braniff ceased doing business with Pliss in April 1992. On July 2, 1992, the airline ceased all operations and the court converted the bankruptcy proceeding to one under Chapter 7.

On July 19, 1994, Spencer and Chodorow were indicted. Count One of the indictment charged that the two men conspired to defraud the DOT by obstructing the DOT's role in the issuance and review of certificates issued to airlines in violation of 18 U.S.C. § 371. Count Two charged Chodorow and Spencer with obstructing a pending proceeding before the DOT in violation of 18 U.S.C. § 1505. Count Three charged that Chodorow and Spencer conspired to fraudulently conceal from creditors property belonging to the bankruptcy estate of Braniff in violation of 18 U.S.C. § 371, and Count Four charged them with bankruptcy fraud in violation of 18 U.S.C. § 152.

Appendix A

Pursuant to a plea agreement, codefendant Chodorow pleaded guilty to Counts One and Two before trial. The jury acquitted Spencer on Counts One and Two, but found him guilty on Counts Three and Four.

DISCUSSION

I. *Legal Sufficiency of the Government's Theory*

Spencer argues that he is entitled to a new trial on the bankruptcy fraud issue because the jury was permitted to convict him on a prosecution theory that was legally insufficient. Spencer argues that the government's theory was that Spencer was a fiduciary who had a duty not to accept money from Pliss for obtaining Braniff's business. Spencer argues that there was no evidence that he owed Braniff a fiduciary duty, and that even if he did, his actions did not deprive Braniff of funds belonging to the airline. He contends that, at most, his scheme deprived Braniff of its right to Spencer's faithful and honest services. Spencer claims that the government had to rely on this fiduciary theory because Pliss had the right to receive and distribute the 15% commission as he saw fit. Thus, Spencer asserts, the government's case must rest on Spencer's purported status as a fiduciary who had a duty not to accept money from Pliss.

Spencer's argument mischaracterizes the government's theory and is beside the point. The government's case was not premised on a breach of a fiduciary duty by Spencer, but rather on the theory that Spencer committed bankruptcy fraud by hiding from the bankruptcy court and creditors the payment of Braniff funds to him through a sham transaction with Pliss. To the extent that Spencer's challenge is one of evidentiary insufficiency, it must be rejected.

Appendix A

In reviewing challenges to the sufficiency of the evidence at trial, "we must view the evidence in the light most favorable to the government and construe all possible inferences in its favor. If any rational trier of fact could have found the essential elements of the crime, the conviction must stand." *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986) (internal citations and quotation marks omitted). In addition, " 'pieces of evidence must be viewed not in isolation but in conjunction.' " *United States v. Brown*, 776 F.2d 397, 403 (2d Cir. 1985) (*quoting United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969)).

The evidence, taken in its entirety, easily demonstrated that the business relationship between Pliss and Spencer was a sham designed to unlawfully conceal from the bankruptcy court and Braniff's creditors Braniff's compensation to Spencer for services rendered. There was evidence that Spencer in fact directed Braniff's executives and made many key corporate decisions, including ordering Braniff's financial officer to transmit the payments to Pliss that resulted in Spencer's enrichment and that were never reflected as payments to Spencer on Braniff's books. There was also evidence that Braniff's advertising costs grew rapidly after Spencer developed a financial interest in Braniff's payments to Pliss and that Pliss transmitted overpayments directly to Spencer, who kept them instead of returning the funds to Braniff. Viewing the evidence in the light most favorable to the government, *see Badalamenti*, 794 F.2d at 828, the evidence was more than sufficient for the jury to conclude that Spencer and Pliss had devised a scheme to launder payments from Braniff through Pliss to Spencer. *See United States v. Martin*, 408 F.2d 949, 953-54 (7th Cir. 1969) (holding that trier of fact could conclude payments to attorney and accountant that were transmitted to corporate officers as "kick

backs" were part of sham transaction to deprive funds from creditors in any future bankruptcy proceedings).

II. *Sufficiency of Evidence of Conspiracy*

Spencer argues that his conviction for conspiracy to commit bankruptcy fraud must be reversed because no rational jury could conclude that he conspired with anyone. Spencer contends that there was insufficient evidence to support a finding that either Chodorow or Pliss conspired with him to commit bankruptcy fraud. We disagree.

Spencer argues that there was an absence of evidence that Pliss was aware of the scheme to defraud Braniff and its creditors or that Pliss even knew that Spencer was keeping the payments from Braniff. Spencer maintains that the government improperly proved the conspiracy by asking the jury first to disbelieve Pliss's testimony that Pliss thought his payments to Spencer were going back to Braniff and then to rely on that disbelief as evidence that Pliss and Spencer were coconspirators. Spencer correctly cites *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952) (Hand, L., J.), for the rule that "while a jury may be permitted to draw negative inferences from disbelieved testimony, a case cannot go to a jury solely on that basis." *United States v. Eisen*, 974 F.2d 246, 262 & n.6 (2d Cir. 1992) (discussing *Dyer*). However, the rule in *Dyer v. MacDougall* is inapplicable if independent evidence supports the government's case. *See Eisen*, 974 F.2d at 262.

In this case, the government presented independent evidence of Pliss's knowing participation in the unlawful scheme in the form of an incriminating paper trail. Pliss identified various checks he made out to Spencer and Spencer's father and, on cross examination by Spencer's own attorney, noted that many of the checks returned to him after being cashed were endorsed by Spencer and contained no indica-

tion that any funds went to Braniff. Moreover, bills sent by Pliss to Braniff did not reflect any "rebate" of 11% to Braniff nor any payments to Spencer. In addition, Pliss transmitted the overpayments to Spencer, not to Braniff. In sum, there was ample evidence for the jury to find beyond a reasonable doubt that Pliss was a coconspirator in Spencer's scheme.

There was sufficient evidence to support a jury finding that Chodorow was a member of the conspiracy as well. Braniff's Vice President of Finance testified that Chodorow instructed him to follow Spencer's directions to make payments to Pliss. Pliss testified that Spencer rejected his request for a higher commission because Chodorow "would never go for [it]." There was substantial evidence that Chodorow knew of and approved of Spencer's role in making key decisions for Braniff even though Braniff's financial records were silent as to payments to Spencer. Viewing the evidence in the light most favorable to the government, *see Badalamenti*, 794 F.2d at 828, a jury could infer that Chodorow was a participant in the conspiracy.

III. *Sentencing Issues*

Spencer also attacks the calculation of his sentence under the United States Sentencing Guidelines. The district court determined that Spencer had a total offense level of 23: a base offense level of 6 under U.S. Sentencing Guidelines Manual § 2F1.1(a) for committing a crime of fraud and deceit; a two-level enhancement under § 2F1.1(b)(3)(B) for violating an administrative order or process; a four-level enhancement under § 3B1.1(a) for his role as an organizer or leader of criminal activity that was "otherwise extensive"; a nine-level enhancement under § 2F1.1(b)(1)(J) for committing an offense causing a loss of more than $350,000; and a two-level enhancement under § 2F1.1(b)(2)(A) for committing an offense involving more than minimal planning. Based

upon the total offense level of 23 and Spencer's category two criminal history, the district court sentenced Spencer to the minimum of 51 months permitted by the Guidelines.

Spencer argues that the district court erred in increasing his offense level (1) for violating an administrative order or process, (2) for his role as an organizer or leader of criminal activity that was "otherwise extensive," (3) for committing an offense causing a loss of more than $350,000, and (4) for committing an offense involving more than minimal planning. We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *See United States v. Zagari*, 111 F.3d 307, 323 (2d Cir. 1997).

A. *Violation of Administrative Order or Decree*

The district court did not err in applying the enhancement for Spencer's violation of an administrative order or process. U.S.S.G. § 2F1.1(b)(3)(B) allows an increase in the offense level for "violation of any judicial or administrative order, injunction, decree or process." The Background note states that a "defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal . . . administrative agencies."

Spencer argues that the activity of DOT did not result in any administrative order, injunction, decree, or process and thus the proscription of U.S.S.G. § 2F1.1(b)(3)(B) was not violated. We disagree. While there was no formal adversary "proceeding" before the DOT resulting in a formal administrative "order" or "decree," there was an extensive negotiation with DOT, culminating in an agreement, evidenced by the affidavits, that was violated by Spencer. In short, there was an informal administrative "process" of negotiation and

an informal "decree" that if the affidavits were not submitted and the promises therein not kept, the DOT would revoke the airline's operating certificate. The propriety of the district court's enhancement on this ground is further supported by the guideline's background commentary: whether Spencer chose to submit to and violate a formal DOT process, or whether he deliberately avoided such process by giving solemn promises to DOT which he later violated, we believe that Spencer demonstrated the same "aggravated criminal intent" underlying § 2F1.1(b)(3)(B).

United States v. Linville, 10 F.3d 630 (9th Cir. 1993), relied upon by Spencer, is inapposite. *Linville* found that disregard for "relatively informal missives and official notifications and warnings of violations" does not evidence the "aggravated criminal intent" underlying the § 2F1.1(b)(3)(B) sentence enhancement. *Id.* at 633. In this case, however, DOT went to considerable lengths to prevent Spencer from participating in Braniff. DOT engaged in extensive negotiations with BNAir, demanding and ultimately obtaining the Spencer and Chodorow affidavits as a condition of allowing the airline to operate. Spencer's conduct in the face of DOT's actions was sufficiently aggravated to warrant the enhancement.

Because we hold that Spencer's violation of the DOT process in this case satisfies § 2F1.1(b)(3)(B), we need not address the difficult issue of whether Spencer's violation of bankruptcy orders also suffices to support an increase under the same provision.

B. *Criminal Activity that was "Otherwise Extensive"*

Spencer's offense level was increased by four levels pursuant to U.S.S.G. § 3B1.1(a) because he was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Application Note 1 to

§ 3B1.1 defines "participant" as "a person who is criminally responsible for the commission of the offense." Because the government does not argue that five criminally responsible participants were involved, the application of § 3B1.1(a) must rest on the "otherwise extensive" requirement. Application Note 3 to § 3B1.1 states that "[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive."

We recently addressed the proper method for determining whether a criminal activity is "otherwise extensive" in *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), where we pointed out that application of § 3B1.1(a) "is based primarily on the number of people involved, criminally and non-criminally, rather than on other possible indices of the extensiveness of the activity," *id.* at 802, and noted that "otherwise extensive" is the "functional equivalent of [a crime] involving five or more knowing participants," *id.* at 803. We held that the sentencing court in making the "otherwise extensive" assessment should determine:

> (i) the number of knowing participants;
>
> (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent;
>
> (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme.

Id. at 803-04. Ultimately, we remanded the case for further findings because the district court erred in emphasizing the number of clients defrauded and the sophistication of the

scheme, and because the roles of various employees involved in the scheme were "obscure." *Id.* at 805.

In this case, Judge Raggi properly limited her inquiry to the persons involved in Spencer's scheme. No useful purpose would be served in remanding the case and requiring Judge Raggi simply to recast her findings in the more explicit terms described by our subsequent decision in *Carrozzella*.

Spencer contends that his activity was not "otherwise extensive" because the airline would have run exactly the same way, with the exception of the payments to Pliss, if Spencer were not involved. Rejecting this argument, Judge Raggi found that:

> What was going on here [was] that Scott [sic] Spencer was determined to run Braniff. . . . [H]e was going to run it no matter what, and he was going to get paid for it, and everybody who is identified on page 18 [of the government's sentencing memorandum], all of these Braniff employees understood that and understood that that was going to be allowed to happen, and so for the protection of their own jobs they went along with all of this.
>
> . . . Mr. Spencer had to find some way to get money to himself that didn't get revealed to various persons, including the bankruptcy creditors, and so all of these people had to basically go along with the larger scheme.
>
> . . .
>
> . . . .
>
> [I]n order to get himself paid, he didn't just have to do one thing or implicate one person, he had to involve the whole company in this fraud that he was involved in.

The district court explicitly endorsed the government's sentencing memorandum listing the number of persons

required for the success of the scheme; finding that Spencer, his father, Pliss, and Chodorow were knowing, criminally responsible participants in the scheme; and finding that a large number of Braniff employees were also essential to the scheme. These employees included Braniff's Vice President of Finance and others in Braniff's accounting department who followed Spencer's instructions to pay Pliss, the advertising personnel who prepared advertising for Pliss, and other employees who facilitated Spencer's ability to exercise control over the airline and its advertising budget. The district court's endorsement of the government's list of persons necessary to carry out the scheme satisfies the requirements of *Carrozzella*. Unlike the district court in *Carrozzella*, Judge Raggi did not rely upon an impermissible factor such as the number of creditors defrauded; nor did she take into account persons whose role was obscure. Thus, the district court properly applied the base offense enhancement under § 3B1.1(a) for Spencer's role as "otherwise extensive."

C. *Amount of Loss and More Than Minimal Planning*

The remaining challenges raised by Spencer to his sentence are also without merit. Spencer contends that the district court erred in increasing his base offense level by nine levels pursuant to § 2F1.1(b)(1)(J) for causing a loss of more than $350,000. He argues that only the money traced to overpayments from Braniff to Pliss, and subsequently transmitted from Pliss to Spencer, are properly included in the loss calculation. He claims that the 11% commission payments from Pliss were not Braniff's property and should be excluded from the loss calculation. As we have discussed, the jury resolved the dispute over the ownership of those funds in the government's favor; therefore, the district court did not err in including all of the payments received by Spencer in the loss amount.

Spencer also claims that the loss amount should be reduced by the value of his services to Braniff. The Third Circuit has held that in calculating the loss amount under the Guidelines, a court should not include fees paid to a person engaging in the unauthorized practice of law to the extent that the service provided was satisfactory. *See United States v. Maurello*, 76 F.3d 1304, 1312-13 (3d Cir. 1996). Even if we were to endorse the approach of the Third Circuit, it would not apply here because the district court made a factual finding that Spencer did not provide valuable services to Braniff and this finding was not clearly erroneous. The district court expressly found that Spencer "was incompetent and I don't understand how anyone could have entrusted him with the operation of this airline." In calculating the loss amount, the district court indicated that the $350,000 loss attributed to Spencer was "conservative" and that his actions possibly caused a much larger loss. We find no error in the district court's determination that Spencer caused a loss of $350,000 to the Braniff estate.

Finally, Spencer's challenge to the district court's increase of his offense level pursuant to § 2F1.1(b)(2)(A) because his offense involved "more than minimal planning" is frivolous. Spencer's creation and implementation of the scheme to launder payments easily fits within this guideline. *See* U.S.S.G. § 1B1.1, Application Note 1(f); *United States v. Cropper*, 42 F.3d 755, 757-59 (2d Cir. 1994); *United States v. Brach*, 942 F.2d 141, 145 (2d Cir. 1991).

CONCLUSION

The judgment of conviction and sentence is affirmed.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

CORRECTED

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of January one thousand nine hundred and ninety-eight.

Dkt. No: 96-1460

USA

Appellee,

v.

Scot Spencer

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Scot Spencer.

Appendix B

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF SENTENCE DATED MAY 23, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-94-742

United States Courthouse
Brooklyn, New York

May 23, 1996
3:00 o'clock p.m.

UNITED STATES OF AMERICA,

-against-

SCOTT SPENCER,

Defendant.

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE REENA RAGGI
UNITED STATES DISTRICT JUDGE

* * *

THE COURT:

* * *

[23] All right. Are there any other challenges that I haven't dealt with?

MR. BURSTEIN: Yes, there's the question of a violation of administrative order.

THE COURT: Yes, by all means go ahead.

MR. BURSTEIN: Judge, so that the record is clear, Your Honor expressed some very strong views on this and as an advocate I know there are times where it doesn't make sense to press a judge when you made up your mind, but I don't want my silence in the face of Your Honor expressing your views on these matters taken as agreement.

THE COURT: I understand.

MR. BURSTEIN: Okay.

With respect to the administrative order, Your Honor, I mean, the probation department came in on the theory that there was some, that the D.O.T. Is desire that Mr. Spencer not be involved and what the government characterized as some sort of promise on Mr. Spencer's part not to be involved was a violation of administrative process. One of the cases they cited, the *Linville* case out of the Ninth Circuit, is not so. There has to be some informal administrative order. If an administrative agency's expression for desire for something to occur were to meet that test, it would be vastly expanding that provision of the guidelines.

[24] THE COURT: But this is very different from Linville where after certain conduct was engaged in by the defendant, she starts to get the letters cautioning her that she may be violating the law. This is a case where the Department of Transportation made it plain to Braniff at the start that they

would not allow the certification to remain in effect if Scott Spencer had anything to do with the airline, and in order to be satisfied that they would not be a problem it demanded affidavits from both Mr. Spencer and Mr. Chodorow.

Now, there were opportunities for hearings on that. There were numerous meetings. This is not like *Linville* at all. This was a rather intensely negotiated issue. I mean, the evidence I heard at trial suggested that before those affidavits were supplied, there were a number of attempts to persuade the Department of Transportation to be satisfied with something less, and so the totality of the circumstances here suggest to me that there was an agreement reached almost as if a consent decree, to use an analogy, that Mr. Spencer would not operate at Braniff, that would be the term on which the airline was to operate by a government agency.

MR. BURSTEIN: My answer to that is two-fold. My most simple answer is I don't think that's what the guideline calls for. There has to be some sort of formal order.

Secondly, factually Your Honor is mistaken because the only thing Mr. Spencer's promise or this agreement that [25] you speak of secured was agreement by the DOT not to begin proceedings to take the license. It wasn't if you work there you are losing your license, that's not what the arrangement was. The arrangement was if you continue to be there we'll start proceedings to take away your license, at which point he would have had an opportunity to answer. There would have been knows, et cetera.

There was no order and effect, that's not the kind of administrative order that is called for by the guidelines, and the

government's other answer is that he violated the processes of the bankruptcy court. I think that all of the cases they cite make our points. Those are debtors.

It's one thing if you are a debtor and submit yourself to the authority of the bankruptcy court. It's different if you are something else that is not subject to the jurisdiction of the court.

So under those circumstances, I don't think and the government has not been able to cite one case, and that should be an indication has there ever been a case where there had been a finding of violation of administrative order process without some sort of formal determination by administration agency? There hasn't been. I credit them and Probation for creativity on this, but the fact is there's never been a case like this which suggests something more is required. The fact *Linville* suggests that you do need some sort of formal order [26] also suggests strongly that I'm right on this.

THE COURT: Mr. Corngold?

MR. CORNGOLD: Your Honor, two points.

First, on the D.O.T. side of this argument, the guideline is written in the disjunctive. It doesn't say order and not say process. It says if the offense involved violation of any judicial or administrative order — I can't remember the other thing — or process, that has to mean that there's a difference between a formal order and something else that has to mean that the guideline is intended in instances where there's not necessarily a formal order, and I don't think that *Linville* says anything more than that. What *Linville* says is that where a defendant received administrative warnings that she ignored that that is not enough to make it into the a process.

But here, I mean, we had extensive briefing, as I said in the brief, in the current brief about this, about whether this is a proceeding whether this crime that was charged in Counts One and Two involved a proceeding, and I think the court understood, and if it was a secret to anybody after hearing two or three days of testimony from the D.O.T. and from D.O.T. counsel, it was clear that there was an extensive process that lead up to the affidavits that under anybody's view of the fact Mr. Spencer violated. So that's the D.O.T.'s side of the argument.

[27] On the bankruptcy court's side of the argument, I think with all due respect that Mr. Burstein is pointing to a distinction without a difference. The crime here is violating the bankruptcy's order and processes, that's clear. The guideline doesn't say did the defendant violate a judicial order or process. What the guideline says is if the offense involved violation of a judicial order or process. It doesn't focus on whether the defendant has violated an order of process that was directed at him, it focuses on whether a defendant in a conspiracy or an aiding or abetting or under any circumstances is involved in an offense that involved a violation of judicial order or process. The guideline is clearly focused at elevating the guideline level for crimes involving what the Sentencing Commission believed were more serious crimes, crimes that hit at the heart of judicial processes or orders or administrative processes or orders. There can't be any question that that is what this crime involved, that's why on the bankruptcy side the two points are appropriate. So I believe under either of the theories the two points are appropriate.

* * *

Appendix C

MR. BURSTEIN: Judge, I think you have the arguments, but it seems to me that certainly to go back to the D.O.T. issue, I mean, what did Mr. Coleman testify to? Mr. Coleman testified that there would have been formal proceedings at which there would have been formal adversary proceedings that seems to me what we mean by process. You know, to talk about negotiations, which is really what we are talking about, negotiations amount to process just extends the words beyond recognition, and I think that the answer to Mr. Corngold's argument I suppose that once Mr. Spencer was within that process, the administrative agency, there might have been things that he was doing that would have been in violation of or offended the process of the agency.

But in the absence of any kind of formal proceeding and where you only have some promise not to do something or they will begin formal proceedings that's just not a violation of administrative process. And with respect to bankruptcy, all of these cases focus upon the fact that the notion is that somebody who sought the protection of the bankruptcy laws is submitting himself to the jurisdiction of the court in having done that, having availed themselves of the protections of the court, they shouldn't be entitled to offend it or offend the [29] processes.

THE COURT: That was, of course, Braniff, the corporation, and who was running Braniff? At least as far as I'm concerned it was Mr. Spencer. The obligations of someone in an office position with respect to the bankruptcy court seem to me to be ones that I would have to consider. He can't both run the company in this shadow capacity and ignore the fact that the company is in the bankruptcy court seeking the protection of that court while he concocts a scheme to deceive the creditors. I have to deal with the fact this is a corporation,

only its officers can be responsible for its conduct in the proceeding.

MR. BURSTEIN: But he wasn't an officer of the corporation.

THE COURT: Not for lack of trying.

MR. BURSTEIN: But that may be, Judge, I understand what you are saying.

THE COURT: He was an officer in fact, if not officially, and he was receiving payment as an officer for the work he was doing, the work he thought he was entitled to, the work he thought he was entitled to pay for, and he concocted a scheme to keep that fact from the bankruptcy creditors. I would enhance for the ground the government said, as I said, he was a defacto corporate officer. He was determined, bent and determined, to give himself that role and payment for it [30] when he had no business doing it, and so to that extent if it's only a bankruptcy creditor who can be held accountable here, Mr. Spencer had assumed a role for himself in this corporation that required himself also to assume the same kind of fair dealings with the bankruptcy court that any officer of the company would have had.

I also have to say that I understand 2F1.1(3)(b) to be intended to sweep broadly. As I said, the entire 2F1.1 guideline is written with recognition that fraud is a difficult crime to pigeonhole and categorize, and so here there's an enhancement provided if there's a violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines, in other words the Commission intends to sweep higher.

Appendix C

Now, I recognize there must be some limits to this sweep, but I remind everyone that the Ninth Circuit's opinion in *Linville* is not controlling on this court, the same way it would be if it were the Second Circuit that had spoken. I read this with care and consideration, as I would any circuit opinion, but I am not certain how the Second Circuit will view this.

I'm satisfied that *Linville* is distinguishable on the facts. As I said, it involved no process of any kind before the defendant in that case started to engage in the conduct that ultimately lead to the problems for which there was a [31] sentence. By contrast here, the bankruptcy fraud had to be put together because Mr. Spencer had already been through the proceedings in the Department of Transportation that were going to review whether Braniff Airlines was allowed to fly. The Department of Transportation decided in what is a routine review procedure that it would not be allowed to fly if Mr. Spencer had any role to play in its management.

You are correct that what would have been required, would have been formal proceedings by the Department of Transportation, but I don't think anyone whose familiar with this case thinks that there would have been much of a chance that Braniff would have emerged from that with an ability to fly, and for that reason Mr. Spencer and Mr. Chodorow signet those affidavits.

After going through that process — whether we call an initial process, an informal process, it's still a regular and routine part of the Department of Transportation's review proceedings for airlines — after going through that process and giving that affidavit and knowing that he had done so in order to run the company and in order to get paid, Mr. Spencer had to concoct

the bankruptcy fraud he did, and for that reason I give this enhancement.

* * *

APPENDIX D — SENTENCING GUIDELINE AND RELEVANT COMMENTARY

PART F — OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. *Fraud and Deceit: Forgery: Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States*

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

* * *

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

* * *

Commentary

Application Notes

5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or adminiatrative order, injunction, decree, or process. If it is established that an entity the defendant*

controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines: e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category))

* * *

Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses if five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

Appendix D

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

* * *